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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 584

HUNT OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1956

No.

HUNT OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgments of dismissal entered June 30, 1956 by the United States Court of Appeals for the Fifth Circuit (in Causes Nos. 15,799 and 15,928) and the orders of the Federal Power Commission issued June 23, 1955 and October 28, 1955. The judgments dismissed Petitioner's petitions to review the two orders of the Federal Power Commission issued June 23, 1955 in FPC Docket No. G-9065 and October 28, 1955 in FPC Docket No. G-9568. Such

orders of the Commission suspended portions of Petitioner's initial rate schedules, modified Petitioner's rate contract and fixed with finality Petitioner's prices for natural gas during the suspension periods without according Petitioner the hearing and without making the findings required by Section 5(a) of the Natural Gas Act.

Both orders involved the identical question and in part involved the same record. Accordingly, they were consolidated below for the purpose of trial, briefing and the filing of a single record (R. p. 139).

This single petition for a writ of certiorari is filed pursuant to paragraph 5 of Rule 23 of the Rules of this Court.

OPINIONS BELOW

The orders of the Federal Power Commission issued on June 23, 1955 and October 28, 1955 (R. pp. 68-70, 173-174) are not yet reported. The majority opinion is reported at 236 F. 2d 828 (Ad. Sheets), the dissenting opinion[1] at 236 F. 2d 785 (Ad. Sheets). Such opinions are printed in Appendix A, pages 1a-43a, and are set forth at pages 191-238 of the Transcript of Record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1956 (App. A, pp. 44a; R. pp. 239-40). Rehearing was denied August 21, 1956 (R. pp. 249-50).

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[1] The dissenting opinion of Judge Brown deals with other causes argued and decided at the same time. All such causes dealt with actions of the Federal Power Commission affecting "independent producers" of natural gas. The portion of such dissent entitled "II. SUSPENSION CASES" is concerned specifically with this action. Other portions of the dissent have an important bearing on this action.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act (15 U.S.C. § 717 r(b), App. B, pp. 47a-48a).

QUESTIONS PRESENTED

1. Whether orders of the Federal Power Commission suspending price provisions in a contract filed as an initial rate schedule are reviewable orders under Section 19(b) of the Natural Gas Act (15 U.S.C. § 717 r(b)).

2. Whether the Federal Power Commission possesses authority under Section 4(e) of the Natural Gas Act (15 U.S.C. § 717c(e)) to suspend, nullify or modify a gas sales contract filed with the Commission as an initial rate schedule.

3. Whether the Federal Power Commission possesses authority under the Natural Gas Act (15 U.S.C. §§ 717-717w) to suspend, nullify or modify a gas sales contract filed as an initial rate schedule without observing the procedural requirements and making the findings required by Section 5(a) of the Natural Gas Act (15 U.S.C. § 717 d(a)).

Other questions relating to the sufficiency of the stated reasons for issuing the suspension orders, the timeliness of one such order and the applicability of such orders to certain sales were also raised in the petitions to review.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 4, 5, and 19 of the Natural Gas Act (15 U.S.C. §§ 717c, 717d, 717r), printed in Appendix B, pp. 45a-51a. Also involved is Order No. 174-B of the Federal Power

Commission, pertinent parts of which are printed as Appendix B, pp. 48a-50a.

STATEMENT

Prior to and since this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, on June 7, 1954, Petitioner has been engaged in the production and sale of natural gas. On July 7, 1952 Petitioner entered into a gas sales contract with United Gas Pipe Line Company for a term of twenty years for the sale of natural gas produced by Petitioner from the Duck Lake Field, St. Mary and St. Martin Parishes, Louisiana (R. pp. 6-54). Such contract, as amended and effective prior to June 7, 1954, provided for a price with tax reimbursement of 13.5 cents per Mcf for the period June 1, 1954 to June 1, 1955, 14.5 cents per Mcf for the period June 1, 1955 to November 1, 1955, 21.20 cents per Mcf for the period November 1, 1955 to November 1, 1956, and contained a price schedule for the remaining years thereof (R. pp. 50-51).

Petitioner, being an "independent producer," filed with the Commission the contract dated July 7, 1952 in its entirety as its initial gas rate schedule pursuant to regulations promulgated by the Commission to implement its jurisdiction under the *Phillips* decision (R. pp. 6, 38, 44, 49). Thereafter, Petitioner made two timely rate filings, as required by the Commission's regulations, to continue the sales involved in accordance with the price schedule of the contract of July 7, 1952 (R. pp. 55-67, 165-72). By the orders issued June 23, 1955 (in FPC Docket No. G-9065) and October 28, 1955 (in FPC Docket No. G-9568) the Commission acting under Section 4(e) of the Natural Gas Act suspended for the maximum periods the effectiveness

of the price schedule of such contract effective on June 1, 1955 and November 1, 1955 (R. pp. 68-70, 173-74). Following the issuance of the orders of June 23, 1955 and October 28, 1955, Petitioner filed timely applications for rehearing and timely petitions for review thereof in the Circuit Court of Appeals for the Fifth Circuit. Cause No. 15,799 involved the order of June 23, 1955 and Cause No. 15,928 involved the order of October 28, 1955 (R. pp. 3, 5, 71-83, 87-88, 175-87). The causes were consolidated for hearing and after hearing the Court entered separate judgments in each cause on June 30, 1956 dismissing the petitions on the sole ground that the orders involved were not reviewable and did not consider the cases on their merits (App. A, pp. 4a, 44a; R. pp. 139, 191-96, 239-40). Petitioner filed a timely petition for rehearing which the Court denied on August 21, 1956 (R. p. 250)

REASONS FOR GRANTING THE WRIT

1. The decisions of the Court below, in Petitioner's view, are in direct conflict with (1) decisions of the Courts of Appeals for the Fourth and Tenth Circuits with regard to the reviewability of suspension orders under Section 19(b) of the Natural Gas Act and (2) decisions of this Court and the Courts of Appeals for the First, Third, Fourth and Tenth Circuits and District of Columbia with regard to orders reviewable under such section of the Natural Gas Act and other regulatory acts containing similar review provisions.

In *Phillips Petroleum Company* v. *F.P.C.*, 227 F. 2d 470, 474 (CCA-10), *cert.* denied, 350 U.S. 1005, the Court decided that a suspension order which fixed the rates of an independent producer with finality for

a period, as did the orders of June 23, 1955 and October 28, 1955, are reviewable. In *Atlantic Seaboard Corp.* v. *F.P.C.*, 201 F. 2d 568, the Circuit Court of Appeals for the Fourth Circuit held reviewable a suspension order which unlawfully extended the suspension period for 22 days and resulted in financial loss. Petitioner has asserted that the orders involved exceed the Commission's authority. Such assertion is clearly supported by this Court's *Mobile* decision, *ante*. In *Isbrandtsen Co.* v. *U.S.*, 211 F. 2d 51, *cert.* denied 347 U.S. 990, the Court of Appeals for the District of Columbia held reviewable the failure of the Federal Maritime Board to suspend the operation of a dual rate system upon a showing that the operation of a new rate system would have an immediate, substantial and irreparable effect on a steamship company.

On the basis of *F.P.C.* v. *Metropolitan Edison Co.*, 304 U.S. 375, and *United Gas Pipe Line Co.* v. *F.P.C.*, 181 F. 2d 796, *cert.* denied 340 U.S. 827,[2] the Court below concluded that Section 19(b) relates "solely 'to orders of a definitive character dealing with the merits * * * and resulting from a hearing upon evidence and supported by findings appropriate to the case.'" As to the latter prerequisite, the Courts have consistently reviewed orders of the Commission as well as other administrative agencies entered prior to hearing and findings based thereon. See *Phillips Petroleum Co.* v. *F.P.C.*, 227 F. 2d 470, 474, *cert.* denied 350 U.S. 1005; *Atlantic Seaboard Corp.* v. *F.P.C.*, 201 F. 2d 568, 572; *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201

[2] The Court's main discussion of these cases is found in its decisions of *Magnolia Petroleum Co.* v. *F.P.C.*, 236 F. 2d 785, 791 (Ad. Sheets) and *Humble Oil & Ref. Co.* v. *F.P.C.*, 236 F. 2d 819, 822 (Ad. Sheets).

F. 2d 334, 337; *Mississippi River Fuel Corp.* v. *F.P.C.*, 202 F. 2d 899; *Isbrandtsen Co.* v. *U.S.*, 211 F. 2d 51, 55, *cert.* denied 347 U.S. 990. See also *American Telephone & Telegraph Company* v. *F.C.C.*, 299 U.S. 232; *American Broadcasting Co.* v. *F.C.C.*, 191 F. 2d 492; *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327. Although the Court of Appeals for the District of Columbia in *United Gas Pipe Line Co.* v. *F.P.C.*, 181 F. 2d 796, refused to review an order prescribing rules for filing tariffs, the Court's decision clearly suggests that a different result would have obtained had the rule resulted in a change in rates without according the hearing required by Section 5(a) of the Act. The instant orders modify the price provisions of contracts filed as rate schedules without according the hearing required by Section 5(a) and fixed rates with finality for the suspension period. The *Metropolitan Edison* case, *supra,* clearly dealt with a procedural issue which had no immediate or substantial effect on the respondent and did not, in Petitioner's view, intend to restrict review in the manner decided by the lower Court.

2. The orders met the test of reviewability under Section 19(b) of the Act and Petitioner exhausted all administrative remedies available to it before seeking judicial review of the Commission's orders. The Commission has no authority retroactively to fix the rates for the suspension periods. *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618; *Hope Natural Gas Co.* v. *F.P.C.*, 196 F. 2d 803, 805; rehearing denied 197 F. 2d 522; *State Corp. Comm. of Kansas* v. *F.P.C.*, 215 F. 2d 176, 183. Moreover, the entry of subsequent orders by the Commission finding that the price provisions of the contract were just and reasonable or any other order would not accord Petitioner any relief for the

suspension period. *Hope Natural Gas Co.* v. *F.P.C.*, 196 F. 2d 803, 804-5, rehearing denied 197 F. 2d 522; *Atlantic Seaboard Corp.* v. *F.P.C.*, 201 F. 2d 568, 572. There can be no question under these circumstances that Petitioner will suffer irreparable injury by the entry of such orders.

The orders entered on June 23, 1955 and October 28, 1955 fix with finality the prices Petitioner may collect for its gas during the suspension periods. *Phillips Petroleum Co.* v. *F.P.C.*, 227 F. 2d 470, 475; cf. *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618. Such orders modify the price provisions of Petitioner's contract dated July 7, 1952 filed as its initial rate schedule without according Petitioner the hearing required by Section 5(a) of the Act and without a finding required by such section that the price provisions of such contract are "unjust, unreasonable, unduly discriminatory, or preferential." *Colorado Interstate Gas Co.* v. *F.P.C.*, 142 F. 2d 943, 954, affirmed 324 U.S. 581; *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F. 2d 60, 66, *cert.* denied 350 U.S. 987. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341. Such order finally determined legal rights of Petitioner under such contract for the suspension period and are thus reviewable. *Phillips Petroleum Co.* v. *F.P.C.*, 227 F. 2d 470, 474, *cert.* denied 350 U.S. 1005; *Atlantic Seaboard Corp.* v. *F.P.C.*, 201 F. 2d 568, 572; *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F. 2d 334, 337-8. Review of such orders which have attached legal consequences is required to protect Petitioner from irreparable injury already caused Petitioner by the entry of such orders. *Columbia Broadcasting System* v. *U. S.*, 316 U.S. 407, 425. The orders are of the type issued during the

course of proceedings which are final and which cannot affect or be affected by any subsequent order issued in the proceedings. *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F. 2d 334, 337-8. The orders are sufficiently distinct from the further proceedings and sufficiently final and definitive to make them reviewable. *Atlantic Seaboard Corp.* v. *F.P.C.*, 201 F. 2d 568, 572.

The failure of Petitioner to seek the present review of such orders would have rendered review unavailable under the time limitations of Section 19(b) of the Act for seeking review. *Louisville Gas & Electric Co.* v. *F.P.C.*, 129 F. 2d 126, 130, 131. Cf. *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S 492, 498. The Court of Appeals for the District of Columbia has held waiting for a hearing "after the ax had fallen" before seeking review is unnecessary when the injury is real, immediate and incalculable and when, as here, the agency's action is beyond the scope of its authority. The injury in the instant proceedings is real, immediate, substantial and even estimatable, and under the circumstances irreparable. *Isbrandtsen Co.* v. *U.S.*, 211 F. 2d 51, 56; *cert.* denied 347 U.S. 990; *Farmer* v. *United Electrical Radio & Machine Workers*, 211 F. 2d 36, 40, *cert.* denied 347 U.S. 943, Cf. *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327, 334. Petitioner was the respondent in each of the proceedings before the Commission and has under the circumstances pursued the only course available to it. The order, if permitted to stand, would deprive Petitioner of revenue in the estimated amount of some $375,000.00 (R. 65, 172). Petitioner is therefore an aggrieved person within the meaning of Section 19(b) of the Natural Gas Act. *F.C.C.* v. *Sanders Bros.*, 309 U.S. 470, 476-7; *National Coal Assoc.* v. *F.P.C.*, 191 F. 2d 362.

3. The Commission's orders, in Petitioner's view, are in conflict with Sections 4 and 5 of the Natural Gas Act as interpreted by this Court's opinion in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation, et al.* (Mobile case), 350 U.S. 332. In the *Mobile* case this Court pointed out that the Natural Gas Act evinces no purpose to abrogate private rate contracts as such, and that the Act expressly recognizes that rates to particular customers may be set by individual contracts and permits the relationship between the parties to a gas sales arrangement to be established initially by contract (350 U.S. at p. 339). If only portions of the price or other provisions of a contract were to be filed or to be considered valid for rate filing purposes, as is the Commission's position, it seems apparent that this Court would have so indicated. With respect to the Commission's power to review a contract filed as a rate schedule it was stated in the *Mobile* decision that the basic power of the Commission is that given by Section 5(a) "to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.'" All that Section 4(e), under which the Commission acted in issuing the orders involved, "does, however, is to add to this basic power, in the case of a newly changed rate or contract * * *, the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective" (350 U.S. at p. 341). Petitioner's rate filings suspended by the Commission gave no notice of any change in the price provisions of the contract dated July 7, 1952, or proposed any change in any price or term thereof. Yet the Commission,

contrary to the foregoing interpretation of Sections 4(e) and 5(a) of the Act decreed, by the promulgation of Section 154.94 of its rules in Order No. 174-B (App. B, pp. 49a-50a), that such rate filings constitute "newly changed rate[s] or contract[s]" and, by the issuance of the orders of June 23, 1955 and October 28, 1955, purported to suspend for the maximum periods the price provisions of Petitioner's contract dated July 7, 1952 relative to the price for gas during the periods June 1, 1955 to November 1, 1955 and November 1, 1955 to November 1, 1956 and to require Petitioner in a hearing, the date for which has not yet been fixed, to justify the price provisions of such contract suspended by such orders.[3]

4. The questions presented are important in the administration of the Natural Gas Act. Prior to the *Phillips* decision, many hundreds of long term contracts were negotiated between producers of gas and natural gas companies transporting gas in interstate commerce for resale containing schedules of prices to

[3] This issue does not in any way relate to the question whether the Commission acted arbitrarily or capriciously or abused such discretionary authority as it may have under Section 4(e) of the Act. Thus, the numerous cases arising under the Interstate Commerce Act (many of which are listed at 138 F. Supp. at p. 416) which have involved the discretionary authority issue and have held the suspension orders not reviewable have no validity in determining whether the orders are reviewable. *Amarillo-Barger Express Co.* v. *U. S.*, 138 F. Supp. 411, 416 fn. 10 (probable jurisdiction noted by this Court, Nos. 125 and 224, 25 L.W. 3103) clearly points out this distinction and expresses the view that where, as here, the "legality" of the order is involved, it is subject to "judicial scrutiny." In the *Mobile* decision this Court also noted that the Natural Gas Act "is in marked contrast" to the Interstate Commerce Act with respect to the establishment by contract of the relationship between natural gas companies and their customers (350 U.S. at 338).

become effective on specific dates. Settlement of the questions (1) whether Petitioner and other independent producers may continue to collect the contract price for natural gas agreed to prior to the *Phillips* decision unless and until the Commission determines, after hearing under Section 5(a) of the Act, that such prices are "unjust, unreasonable, unduly discriminatory, or preferential" or (2) whether the Commission may suspend under Section 4(e) of the Act and require an independent producer to justify all price provisions of a contract entered into prior to the *Phillips* decision except the prices in effect on the date of that decision will resolve one of the most pressing questions which has arisen in applying the Natural Gas Act to independent producers. In Petitioner's view, the applicability of Section 4(e) to price provisions of a contract filed as an initial rate schedule under Section 4 of the Natural Gas Act has not been judicially determined. The two cases[4] sometimes cited in support of the Commission's position did not pass on the questions raised by Petitioner's petitions to review. The first of these cases and the Commission's original decision (2 FPC 170, 176) were predicated on prior decisions of this Court,[5] which this Court's *Mobile* decision and the

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[4] *Mississippi River Fuel Corp.* v. *F.P.C.*, 121 F. 2d 159; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388.

[5] *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U.S. 109; *Union Dry Goods Co* v. *Georgia Public Service Corp.*, 248 U.S. 372.

decision of the Court of Appeals for the Third Circuit in the *Mobile* case (215 F. 2d 883, 886) pointed out are inapplicable in determining the authority under Section 4 of the Act to modify contracts filed as rate schedules. Moreover, these cases were decided prior to this Court's *Mobile* decision which clearly decided that many prior actions the Commission has taken with respect to contracts lawfully filed as rate schedules exceed its authority under Section 4 of the Act.

CONCLUSION

The orders of the Federal Power Commission are in conflict with this Court's interpretation of the Natural Gas Act in its decision in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332. Review of the orders will resolve one of the most pressing problems that has arisen under this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and one which has not been judicially determined. The decisions of the Court of Appeals for the Fifth Circuit that the orders are not reviewable are clearly erroneous, are in conflict with decisions of the Courts of Appeal for the Fourth and Tenth Circuits and are not in harmony with many other judicial precedents.

Accordingly, pursuant to Section 19(b) of the Natural Gas Act and Paragraph 1(b) of Rule 19 of

the Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 17th day of November, 1956:

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JOHN T. FEY, Clerk

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15799

HUNT OIL COMPANY, *Petitioner,*

VERSUS

FEDERAL POWER COMMISSION, *Respondent.*

No. 15928

HUNT OIL COMPANY, *Petitioner,*

VERSUS

FEDERAL POWER COMMISSION, *Respondent.*

Petitions for Review of Orders of the Federal Power Commission, sitting at Washington, D. C.

(June 30, 1956.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: These two cases which were consolidated for trial and are here on a single record are companion cases to *Humble Oil & Refining Company* v. *Federal Power Commission,* No. 15,704, decided this day. As in *Humble Oil,* petitioner has also invoked the jurisdiction of this Court under Section 19(b) of the Natural Gas Act, and is seeking a review of two orders of the Federal Power Commission, issued on June 23, 1955 and October 28, 1955, respectively, by which the Commission suspended for a period of five months two proposed in-

creases in rates charged by petitioner for natural gas sold to United Gas Pipe Line Company under its contract dated July 7, 1952.

The questions presented by the petitions for review are identical to those raised in the *Humble Oil* case, that is, the reviewability and, if reviewable, the validity of the Commission's orders; and petitioner is here urging the invalidity of the orders on two of the grounds which were relied upon in the *Humble Oil* case. Other and additional contentions raised by petitioner herein, however, differ from those which were presented in *Humble Oil* and a review of the pertinent facts is necessary to properly dispose of them.

In compliance with the regulations of the Commission which were promulgated in its series of 174-Orders, petitioner on October 5, 1954, filed under protest and with jurisdictional reservations the aforementioned contract, as amended, reflecting rates and charges in effect on June 7, 1954, for the wholesale of natural gas to United. Petitioner's contract as then filed required United to pay 13.5 cents per Mcf. for the period June 1, 1954 to June 1, 1955, 14.5 cents for the period June 1, 1955 to November 1, 1955, and 21.20 cents for the period November 1, 1955 to November 1, 1956, which prices included reimbursement of the Louisiana gas gathering tax. On May 31, 1955, under like protest, petitioner filed a "Notice of 'Change' in Rate Schedule" which contained the price adjustment provisions of the above contract for increase in rates and charges from 13.5 cents to 14.5 cents per Mcf., effective on June 1, 1955. On June 23, 1955, the Commission issued an order almost identical to that issued in the *Humble Oil* case in which it ordered that a public hearing be held upon a date to be fixed by the Commission, and suspended the proposed changes in rates and charges.[1] Thereafter, peti-

[1] The reasons given by the Commission for suspending the rates were: "The increased rates and charges proposed in the aforesaid filing have not been shown to be justified, and may be unjust, un-

tioner filed a timely application for rehearing and for reconsideration and vacation of the June 23 suspension order, and in the alternative, for a shortened suspension period and for stay of said order. The Commission, being of opinion that the grounds alleged in the application did not present any questions of fact or principles of law which warranted any change in or modification of its June 23 order, issued an order on August 18, 1955, denying a rehearing. Thereupon and on September 28, 1955, petitioner filed its petition for review of the June 23 suspension order.

Meanwhile, and before a date had been set for the hearing on the reasonableness of the rate increase which was to have been effective on June 1, and while the petition for review of the order suspending that change was pending in this Court, petitioner, on September 22, 1955, had filed under protest, a second "Notice of 'Change' in Rate Schedule" which contained the further provision of the sales contract with United for increase in price to 21.20 cents per Mcf. to be effective on November 1, 1955. The Commission also suspended this change in rate by an order issued on October 28, 1955, pending a hearing to be had on a date thereafter to be fixed upon notice from the Secretary. The reasons assigned and the Commission's findings were identical to those set forth in the June 23 suspension order. On November 14, 1955, petitioner filed an application for rehearing and for reconsideration and vacation of the second suspension order, and in the alternative, for a shortened suspension period and for stay of that order. This application was likewise denied by the Commission in an order issued on December 2, 1955, and the reasons stated for its denial of rehearing were the same as those

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reasonable, unduly discriminatory, or preferential, or otherwise unlawful." The Commission's findings were: "It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon a hearing concerning the lawfulness of the said proposed changes, and that the above-designated supplement be suspended and the use thereof deferred as hereinafter ordered."

set forth in its order of August 18 in which it had previously denied a rehearing of the June 23 suspension order. Following the denial of this application for rehearing, petitioner filed a second petition for review in which it sought to have the October 28 suspension order vacated.

Petitioner claims that both of the suspension orders are invalid and it seeks to have them set aside if not *in toto*, at least to the extent that they apply to sales of natural gas to United for industrial use only. Here, as in *Humble Oil & Refining Co.* v. *Federal Power Commission, supra*, two of the grounds urged for the invalidity of the suspension orders are: (1) that the prices involved were contract prices and as such constituted the "initial" rate filed by petitioner which is not subject to suspension under Section 4 of the Act; and (2) that the orders are void because they do not give "reasons" for the suspension as required by the Act. In addition, petitioner further urges that both orders are invalid inasmuch as they suspend an increase in rates for sale of gas for industrial use only. As supportive of its claim that a considerable portion of the gas sold to United is exempt from the suspension provisions of Section 4[2], petitioner cited a statistical publication of the Commission[3] showing that for the year ended December 31, 1953, United was making sales of some 477,542,604 Mcf. out of a total 1,040,496,749 Mcf. to main line industrial customers. Finally, petitioner contends that the order of October 28 is void because it was issued more than thirty days after the notice of change in rate had been filed with the

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[2] Section 4 of the Natural Gas Act which gives the Commission authority to suspend new rate schedules contains the following proviso: "*Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only. . ."

[3] Statistics of Natural Gas Companies 1953 Compiled from Annual Reports Submitted by Natural Gas Companies Pursuant to the Requirements of the Natural Gas Act, p. 402A.

Commission, contrary to the statutory notice provisions of Section 4(d) of the Act.

We think that the legal principles in respect to the reviewability of the orders here involved are identical with those presented in *Humble Oil & Refining Company* v. *Federal Power Commission, supra,* and what we said there is dispositive of this case. Accordingly, and for the reasons there stated at length, we conclude that the petitions for review must be dismissed for lack of jurisdiction.

DISMISSED.

BROWN, Circuit Judge, dissenting.

A True Copy:
Teste:

JOHN A. FEEHAN, JR. *Clerk*

By CLARA R. JAMES, Deputy
Clerk of the United States Court of
Appeals for the Fifth Circuit

(SEAL)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,320

MAGNOLIA PETROLEUM COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,321

THE OHIO OIL COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,352

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,354

WESLEY WEST, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,471

GULF OIL CORPORATION AND GULF REFINING COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,470

THE TEXAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,461

UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,704

HUMBLE OIL & REFINING COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,627

STANOLIND OIL & GAS COMPANY, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,678

CONTINENTAL OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,799

HUNT OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,928

HUNT OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,832

RALPH B. SHANK, TRUSTEE FOR NELSON BUNKER HUNT TRUST ESTATE, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,749

ROY LEE, TRUSTEE FOR HASSIE HUNT TRUST, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,706 through No. 15,721
(16 cases)

CONTINENTAL OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

[*Petitions for Review of Certain Orders of the Federal Power Commission Sitting at Washington, D. C.*]

(June 30, 1956)

Before BORAH, RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

It is with the greatest of deference that I feel myself under the overpowering compulsion of dissenting from my Brothers in these important and carefully considered cases. My differences are deep and fundamental and rest not at all upon a criticism of these opinions which, with articulate craftsmanship, fairly and honestly set forth the principal facts and expound the contentions. It is my view that these decisions are too much the product of an excision under the artificial sterility of a laboratory test with inadequate regard for the realities. They have absorbed too completely the recurrent plea of the Commission

that these cases are not to be reviewed "in a vacuum"—a figure with which I am in agreement as an aid to analysis. A vacuum is to be avoided because a vacuum lacks air, that is, the oxygen, life-giving qualities of facts and actuality. Differing not in the least on the need for oxygen (facts), it is my view that it is the Court, not these records, which has cut itself off from the abundant supply. For it is not only air which we need and which we have, but gas.

We have been thrice-told, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 86 L.Ed. 1563; *Frozen Food Express* v. *United States*, — U.S. —, — L.Ed. — [Nos. 158-161, October Term 1955, April 23, 1956]; *United States* v. *Storer Broadcasting Company*, — U.S. —, — L.Ed. — [No. 94, October Term 1955, May 21, 1956], that as the heavy hand of Government descends upon citizen or business, the Court need not, in its sheltered retirement, divorce itself from knowledge of life as though it were something profane or permit Government administrators, with their inevitable parochial provincialism, to determine the nature of the activity being scrutinized through the theoretical notions conceived or contemplated in some monolithic redoubt.

It therefore seems remarkable to me that in thirty-six cases argued over a week's time presenting nearly every situation confronting the gas industry, the Court finds that not a single one is reviewable.[1] This is done, variously

[1] If our decisions and Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 231 F. 2d 461, stand, there is no review of these substantial questions in sight, for Federal Power Commission v. Union Producing Company, D.C. Cir., 230 F. 2d 36; Gulf Oil Corporation v. Federal Power Commission, D. C. Cir. 230 F. 2d 40, foreclose the equity injunction. During the four days' argument of these cases, I vainly sought from anyone or all of the battery of advocates for the Commission, even a hypothetical situation in which *some* gas producer involved in *some* situation could have *some* significant review. Apparently some slight character of "review" is given to the State Tax Escalation Cases

stated, on the ground that none of these actions by the Commission is a definitive "Order" having requisite compulsory characteristics.

In my view that comes about from the theoretical approach which does not adequately reckon with the practical everyday processes of the gas industry in its numerous phases, and an appraisal of the impact of these administrative actions in the light of realistic actuality. I think an examination of all these cases in their major categories will demonstrate the practical decisive business consequences of these actions and, from the standpoint of the technical ripeness or sufficiency of a given case for present review, consideration of all will indicate clearly the existence of at least one case in which *each* significant point is adequately presented. In this analysis[2] and exposition, I approach each case from the standpoint of the basic question of reviewability and decline to find some

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(note 2, infra), but in the setting of the approach of nonreviewability in the fundamental jurisdictional situations and the complete bypassing of those problems (though present) in this one group, it indicates to me that in fact no review is really recognized even there.

[2] For convenience I group and refer to the cases in these categories: I. Order No. 174 Cases: No. 15320, Magnolia Petroleum Company; No. 15321, The Ohio Oil Company; No. 15352, The Superior Oil Company; No. 15354, Wesley West; No. 15471, Gulf Oil Corporation, Gulf Refining Company; No. 15470, The Texas Company; No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. II. Suspension Cases: No. 15704, Humble Oil & Refining Company; No. 15627, Stanolind Oil & Gas Company; No. 15678, Continental Oil Company; No. 15799, Hunt Oil Company; No. 15928, Hunt Oil Company; No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. III. Abandonment Cases: No. 15832, Shank, Trustee; No. 14749, Roy Lee, Trustee. IV. State Tax Escalation Cases: Nos. 15706 through 15721, Continental Oil Company.

This division is for convenient, orderly presentation, but the entire opinion applies to all of the cases without regard to topical or category subdivisions.

way, either on the indicated merits or some procedural aspect, to deny review. When the Court is so overwhelmingly committed to a philosophy of nonreviewability that should be, and is, the point of our departure. As I adhere to this approach, comments or statements may frequently appear in which the merits of a particular contention are assayed. These are not to be understood as a variance from my method. They are put forward not to reflect either tentative, or final conclusions, a *pre* or partial judgment on them. They are put forward solely to put flesh on these bones, to show the vital impact of agency action and the existence of substantial, serious, frequently difficult questions.

The Standard of Reviewability

At the outset it is plain that, contrary to my Brothers, I find in *Columbia*[3] *Broadcasting System, Inc. v. United*

[3] "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." Columbia Broadcasting System, Inc. v. United States, supra, at 316 U.S. 425, 86 L. Ed. 1575. "The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. • • • The regulations are not any the less reviewable because their promulgation did not operate of their force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract." *Id.* at 316 U.S. 417, 86 L. Ed. 1571. "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it. • • •" *Id.* at 316 U.S. 420, 86 L. Ed. 1573.

Federal Communications Com. v. American Broadcasting Co.,

States, supra, ample basis for reviewability where regulations thought to be of far-reaching and perhaps devastating effect are yet couched in general terms and directed against no party in particular. Indeed, the presence in the Natural Gas Act[4] of substantial penalties for violation of the regulations brings these cases within the pre-*Columbia* law.[5]

Any lingering doubts must have evaporated with *Frozen Food Express v. United States, supra.* These regulations were surprisingly similar to those involved here. It was an *Ex Parte* proceeding, with the report, seventy-one pages

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347 U.S. 284, 98 L. Ed. 699, reviewed and enjoined similar general regulations applicable to all. See also, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L. Ed. 817.

[4] Section 21(b) (15 USCA 717t(b)): "Any person who wilfully and knowingly violates any rule, *regulation,* restriction, condition, or order made or imposed by the Commission under authority of this act, shall, *in addition* to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500.00 for *each* and every *day* during which such offense occurs." [italics mine]

[5] Mr. Justice Frankfurter's dissent in *Columbia,* supra, 316 U.S. 429, 433, 434, 86 L. Ed. 1577, 1580, characterized the prior cases of reviewability, "In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency." His comment analyzing United States v. Berwind-White Coal Mining Co., 274 U.S. 564, 71 L. Ed. 1204, as well as the other cases, United States v. Baltimore & Ohio Railroad Co., 293 U.S. 454, 79 L. Ed. 587; American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 81 L. Ed. 142; Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 56 L. Ed. 729; Chicago, R. I. & P. R. Co. v. United States, 284 U.S. 80, 76 L. Ed. 177; Rochester Telephone Corp. v. United States, 307 U.S. 125, 83 L. Ed. 1147, involving specfic penalties for violation of regulations, is significant: "Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable." *Id.* at 316 U.S. 334-336, 86 L. Ed. 1580, 1581.

in length, listing specific items determined by the Interstate Commerce Commission to be within the agricultural commodity exemption of Section 203(b)(6), 49 USCA 303(b)(6). Reversing a three-judge holding of nonreviewability on the rubric of *United States v. Los Angeles Railroad Co.*, 273 U.S. 299, 71 L.Ed. 651, the Court sustained reviewability since, "The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. * * * The determination made by the Commission is not therefore abstract, theoretical, or academic. * * * The 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. * * * Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. * * * Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'Order' of the Commission is in substance a 'declaratory' one * * * 5 USC 1004(d) which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done. * * *"

And *Frozen Food* was followed shortly by Storer Broadcasting Company, *supra,* holding general regulations determining eligibility for TV station licenses were orders reviewable at the suit of one in that business prior to the denial of a specific license application for, the Court said, "The Rules now operate to control the business affairs of Storer. * * * Storer cannot cogently plan its present or future operations. * * * These are grievances presently restricting Storer's operations." The *Columbia*[6] doctrine

[6] The key to the majority's misreading of *Columbia* is found, I think, in the preoccupation in the Magnolia opinion (No. 15320)

has an expansive vitality to require that Courts view these matters in the light of a living world.

I.

Order 174 Cases

A consideration of but a few parts of Orders 174 A or B will demonstrate, I think, that the action of the Com-

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with some supposed peculiar difference between a Section 402(a) (Title 47 USCA 402) Urgent Deficiences Act, (October 22, 1913, 38 St. L. 208, 219, Chap. 32) and a Section 402(b) review which, for all practical purposes, is the same as Section 19(b) here. Significantly, Mr. Justice Frankfurter in his *Columbia* dissent completely ignored that point and in neither of the dissents in *Frozen Food Express* or *Storer* is it even mentioned as a valid basis for distinction. In *Storer*, of course, it was our precise situation—a statutory review by the Court of Appeals. In 402(a) and (b) and in 19(b), the requirement of an "Order" and the basis for reviewability is substantially the same. Scripps Howard Radio, Inc. v. Federal Communication Commission, 316 U.S. 4, 15, 16, 86 L. Ed. 1229, 1237, "It is urged that the orders reviewable under § 402(a) * * * are intrinsically different from those reviewable under § 402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform * * * As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington * * *." See also, Philadelphia Co. v. S.E.C., D.C. Cir., 164 F. 2d 889 at 897, cert. den. 333 U.S. 828, 92 L. Ed. 1114, subsequent proceedings, 175 F. 2d 808, reversed as moot 337 U.S. 901, 93 L. Ed. 1715.

Amshoff v. United States, 7 Cir., 228 F. 2d 261, cert. den. 24 L.W. 3309, May 21, 1956, under the Hobbs Act, 5 USCA 1031, likewise reviewed, over the Administrator's contention that no definitive order had been entered, a general regulation which had the effect (as does much of the 174 Orders here) of repudiating an old and adopting a new administrative substantive policy.

The majority's emphasis (Magnolia 15320) on the requirement for, "A transcript of the record upon which the order complained of was entered" and the usual situation of an order, "of a defini-

mission has tremendous practical, direct business consequences on those who produce natural gas.

The Order Determines Who Is Subject to the Act

When it is recalled that the whole sweep of the 174 Orders is to outline action to be taken by those brought under the Act by the Phillips decision, the definition[7] of "Independent Producer" has a positive and practical effect on the industry. This is so because it is the imprimatur of the Commission itself on the Phillips decision and, more so, it is one of doubtful validity. The doubt arises because the definition comprehends all those engaged in the production or gathering of gas who sell it in interstate commerce for resale. By its terms no distinction is made between those who sell *before* and those who sell *after* the production and gathering is completed. The regulation

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tive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case, Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 * * *" cannot, by a boot-strap-lifting process, defeat reviewability. The absence of a hearing, the receipt of evidence, the making of findings which is the very basis of much of the attack cannot thus be turned into a deficiency making it unreviewable, National Coal Association v. Federal Power Com., D.C. Cir., 191 F. 2d 462, 466; Saxton Coal Mining Co. v. National Bituminous Coal Comm., D.C. Cir., 96 F. 2d 517; American Sumatra Tobacco Corp. v. S.E.C., D.C. Cir., 93 F. 2d 236; Philadelphia Co. v. S.E.C., supra; see also, Columbia Oil and Gasoline Corp. v. S.E.C., 3 Cir., 134 F. 2d 265, 267. And, of course, where validity of regulation presents question of law on the face of the orders or regulations a "record" of evidence is not needed, see discussion of cases under II, Suspension Cases, infra.

[7] § 154.91 " 'Independent producer' as that term is used in these Rules means any person as defined in the Natural Gas Act who is *engaged in the production or gathering of natural gas* and who transports natural gas in interstate commerce *or sells* natural gas *in interstate commerce for resale*, but who is not primarily engaged in the operation of an interstate pipeline." [Italics mine]

therefore reflects the Administrator's interpretation[8] of an opinion which is, or may be, read much differently by others.

Whatever else the Court meant to say or do, it seems plain to me that the Court was being careful to point out that sales made during production or gathering were not within the scope of the decision:

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[8] Original Order 174 in the prefatory portions stated: "The decision of the United States Supreme Court on June 7, 1954, in Phillips Petroleum Company v. Wisconsin et al (347 U.S. 672) holds that persons engaged in the production and gathering of natural gas but which also transport natural gas in interstate commerce or make sales in interstate commerce for resale are 'natural gas companies' subject to all the requirements of the Natural Gas Act. • • •"

In the Commission's brief in No. 15471, Gulf Oil Corporation, pages 1 to 3: "• • • These orders [174] stem directly from the decision of the Supreme Court in Phillips Petroleum Co. v. Wisconsin • • • in which that court held that the Commission has jurisdiction over independent producers which engage 'in "the sale in interstate commerce of natural gas for resale," and that such a company' is a '"natural gas company" within the meaning of that term as defined in the Natural Gas Act' (p. 677). By these orders the Commission • • • promulgated general rules and regulations to be applicable to natural-gas companies which were also independent producers subject to Commission jurisdiction under the Act. • • • • • • the Supreme Court held in Phillips Petroleum Co. v. Wisconsin, • • • that sales in interstate commerce for resale by producers and gatherers to interstate pipeline companies do not come within the 'production or gathering' exemption, but that producers and gatherers making such sales also are 'natural-gas companies' under the Act, and the Commission has the authority to regulate such sales."

The Commission's brief in Magnolia No. 15320, page 4: "• • • the Supreme Court on June 7, 1954, held that the Commission had jurisdiction over sales of natural gas in interstate commerce for resale, including such sales in the area of production and gathering • • •."

This "extreme" view of the Phillips decision was successfully pressed by the Commission in Federal Power Com. v. J. M. Huber, D.N.J., 133 Fed. Supp. 479 (now on appeal Third Circuit).

"• • • production and gathering in the sense that those terms are used in Section 1(b), end before the sales by Phillips occur." 347 U.S. at 678, 98 L.Ed. at 1045.

Nothing in that opinion[9] impairs the authority of its prior holdings that Section 1(b) "• • • precludes the Commission from any control over the activity of producing or gathering natural gas", *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U.S. 581, 603, 89 L.Ed. 1206, 1223; that the Commission has no power "• • • to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern", *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U.S. 682, 690, 91 L.Ed. 1742, 1748; that the regulations of the Commission may not be "• • • inconsistent with the exercise by [the states] • • • of the powers over production and gathering of natural gas reserved to it by Congress in § 1(b) of the Act", Id. at 331 U.S. 691, 91 L.Ed. 1748.

It is because of the genuine and reasonable basis for difference in the interpretation of the Phillips opinion that the regulatory definition has such an impact. Until there

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[9] In the Phillips case (347 U.S. at 678, 98 L. Ed. at 1045-1046), the court reaffirms the previous cases on Section 1(b): "In Federal Power Commission v. Panhandle Eastern Pipeline Co., 337 U.S. 498, • • • we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties and gathering facilities of a natural gas company'. Similarly in Colorado Interstate Gas Co. v. Federal Power Com., 324 U.S. 581, 598 • • • we stated that "[t]ransportation and sale do not include production or gathering', and indicated that the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas. *Id.* 324 U.S. at 602, 603. See also, Federal Power Com. v. Hope Natural Gas Co., 320 U.S. 591, 612-615, 88 L. Ed. 333, 350-352 • • •; Peoples Natural Gas Co. v. Federal Power Com., 75 App. D.C. 235, 127 F. 2d 153; cf. United States v. Public Utilities Com., 345 U.S. 295, 307-311, 97 L. Ed. 1020 • • •."

was an administrative definition describing those persons who would come within the meaning of the Phillips decision, it would be a matter of individual interpretation. Even though it were ultimately determined by subsequent proceedings that such interpretation was the correct one, no one in the interim could have been subjected to penalties for the violation of a regulation (since none existed) and the continued reasonable doubt about the interpretation itself would prevent the severe penalties for a criminal violation under Section 21(a), 15 USCA 717t (a).

But with the definition by regulation, all of that is removed. All that is left now for the individual is the ultimate validity of that definition. By force of this definition, one who produces natural gas and sells it for resale in interstate commerce is conscious that he is then subject to the Act and must conform all of his activities to it and must take the specific action which other sections of the Order command. I shall show in subsequent detail what these are, but even without this, it is completely unrealistic to say that profound consequences are not imposed when the Order, at its outset, transmutes, for example, the owner of the working interest in a small gas well from a simple entrepreneur into a quasi public utility. Like the trucker who hauled grapefruit and seeks frozen chickens to eliminate a dead haul, cf. *Frozen Foods, supra,* this act of Government has changed his whole economic life.

The Order Requires Filing of Rate Schedules

In the face of the positive command for the filing of rate schedules[10] as of June 7, 1954, by all "Independent

[10] Order 174 A, Section 154.92, "(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, [subsequently changed to December 1, 1954] file with the Commission rate shedules, as defined in Section 154.93 hereof, setting forth the terms

Producers", it is difficult for me to follow the majority's statement (Magnolia No. 15320), "* * * Order 174-A is not a formal determination of any right or obligation; is not self-executory, and it does not command these petitioners to do or refrain from doing anything. * * *"

Since the Order (§ 154.92) is directed to an "Independent Producer" who is, in turn, defined in § 154.91 to be those who make interstate sales while producing and gathering, this regulation is an immediate, positive, firm, absolute requirement for the filing of rate schedules. It is plain and unequivocal in its terms, and being a regulation, it subjects those who fail to comply to the severe penalties (note 4 *supra*) of "$500.00 for each and every day during which such offense occurs." Not only does it subject the producer to fines and penalties, but the filing of these contracts by its nature turns his business into one of public concern. What was the moment before Order 174 his business, now becomes the Commission's business. It may be that ultimately that is what the Phillips decision intended and the regulation will have a validity to achieve that end. But that does not remove the fact of the impact of this regulation upon this business man. It, and it alone, compels him under the pain of immediate penalties to alter his whole business concept.

And in this situation particularly, it is the impact of the regulation alone which brings about the necessity for filing of the rate schedules. The Act itself is not self-executing and requires the regulations as a condition precedent.[11]

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and conditions of service and all rates and charges for such * * * sale effective on June 7, 1954. * * * (b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate * * * sale * * * to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days * * * a rate schedule * * *."

[11] Section 4(c) of the Act: "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such *time* * * * and in such *form* as the Commission may designate, and shall keep open in conven-

Moreover, this specific provision of the Order illustrates well the futility of later, or more, or subsequent proceedings which the Commission insists are necessary to satisfy the requirement of exhaustion of the administrative process. E.g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 82 L.Ed. 638; *Public Service Comm'n* v. *Wycoff*, 344 U.S. 237, 97 L.Ed. 291; *Canadian River Gas Co.* v. *Federal Power Commission*, 10 Cir., 110 F.2d 350, reh. den., 113 F.2d 1010, cert. den. 311 U.S. 693, 85 L.Ed. 449; *United Gas Pipe Line Co.* v. *Federal Power Commission*, D.C. Cir., 181 F.2d 786, cert. den. 340 U.S. 827, 95 L.Ed. 607. If a regulation is not valid either because it is too sweeping or, as claimed by some of these petitioners, it covers a person not within the Act, how is it to be tested? If the complaint is directed against a regulation compelling the filing of private papers, what more is needed to test that than the Order itself? What sort of administrative proceeding is reasonably needed if a citizen conscientiously thought that this provision of the Order was illegal? Must he surrender the very papers for public perusal which he contends are his own business? If he is hurt because he is threatened with the necessity of surrendering private documents, has it not become incurable if to test it, he must first comply?

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ient form and place for public inspection schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission * * *." [Italics mine]

Whatever may be the juridical metaphysics, e.g., Douglas v. County of Pike, 101 U.S. 677, 25 L. Ed. 968; Norton v. Shelby County, 118 U.S. 425, 30 L. Ed. 178, of what the 1954 Phillips decision did to a 1938 Act, it is plain that the Commission never claimed that it had the right to or was regulating these independent producers, Columbian Fuel Corporation, 2 FPC 200; Fin-Ker Oil and Gas Production Co., 6 FPC 92; Chicago Corporation, 6 FPC 98; Phillips Petroleum Co., 10 FPC 246, and to suggest now that on the birth of *Phillips*, the general regulations covering interstate transmission pipeline companies applied automatically to these individual producers lacks genuine substance.

The Order Requires Filing of Changes in Rate Schedules

Equally compelling, Section 154.94, is the imperative command that, "No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate * * * sale of natural gas * * * by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the * * * Act and in accordance with this section."

No status determination is needed here. The definition is "Independent Producer" and a sale which makes him one under Section 154.91 is all that is needed. From that moment on the regulation by its own terms is self-executing to impose the mechanical obligation of preparing and filing all such changes. Not only does that impose an obligation subjecting the producer to a $500.00 daily fine for noncompliance, but this has an immediate effect in circumscribing the nature and extent of his business negotiations, transactions, and agreements which he may make, or desire to make, with present or prospective customers. Surely an Order which states that no change can be made unless it is first filed has real and far-reaching effects. The very imminence of such a regulation calls for the immediate reconstruction of one's business. In the fundamental concept of its nature, it has, in the twinkling of an eye, ceased to be private and now becomes clothed with a certain public interest, or at least a certain public control.[12]

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[12] It should be borne in mind that questions of this type stated in emphatic terms are not to be taken as a conclusion that such Governmental supervision is wrong or invalid, or that the regulation is. We are here concerned only with an analysis of the Court's theme that Order 174 has no effect upon, does not require action by, these petitioning gas producers.

The Order Prohibits Auto[illegible]*natic Contract Escalations*

Here, without a doubt, the [illegible]egulations promulgate a new and revolutionary policy hav[illegible]ing substantive consequences of great importance. For th[illegible] Order, in connection with its requirements concerning the [illegible]filing of rate schedules and changes in rate schedules, [illegible]ategorically states that contract escalations are a chan[illegible]e of rate.[13] This has a substantial and immediate tw[illegible]fold impact: first, from a technical, procedural point [illegible]of view, it has the effect of making the escalated rate a [illegible]"new" or initial filing under Section 4(d)(e) with the co[illegible]nplex problems of burden of proof and interim suspens[illegible]on flowing from that; and, second, the inability of the p[illegible]arties as a matter of actuality to enjoy the complete, pr[illegible]mpt and uninterrupted performance of the agreements [illegible]as made by them.

At the heart of both is the [illegible]fact that, "* * * the Act, * * * evinces no purpose to abro[illegible]ate private rate contracts as such. To the contrary, by [illegible]equiring contracts to be filed with the Commission, the [illegible]Act expressly recognizes that rates * * * may be set by [illegible]ndividual contracts * * * The obvious implication is that, [illegible]except as specifically limited by the Act, the rate-makin[illegible] powers of natural gas companies were to be no diff[illegible]erent from those they would

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[13] Section 154.94 (Order 174 A): "The operation of any provision of the rate schedule provi[illegible]ing for future or periodic changes in the rate, charge, classificati[illegible]n, or service after June 7, 1954, or the effective date of any ra[illegible]e schedule for intial service after June 7, 1954, shall constitute a [illegible]change in rate schedule."

Substantially the same provisi[illegible]n is contained in Section 154.94(c) of Order 174 B except that thi[illegible] Section has been made even more specifically applicable to price [illegible]hanges provided for in an "initial rate schedule." In addition, [illegible]Order 174 B, Section 157.25, demns, in advance, escalator [illegible]clauses in producer contracts submitted in support of applicati[illegible]ns for Certificates which would, of course, affect interstate trans[illegible]mission pipeline companies, since long-term contracts for their [illegible]essential gas reserves which have heretofore contained escalation [illegible]clauses (see note 14 infra) could no longer contain them. Thi[illegible] is thus a radical departure on a wide front from former substa[illegible]tive policies.

possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. * * * By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, — U.S. —, — L.Ed. — [No. 17 and 31, October Term 1955, February 27, 1956].

The petitions before us adequately show that these gas producers each have long-term contracts with various gas purchasers, interstate transmission pipeline companies in which, following the traditional usage of the industry with the full approval of regulatory agencies, provision is made for the automatic increase in the price of the gas under the stated conditions. The escalation provisions are the direct outgrowth of the necessities of the contract and of the pipeline purchaser. Those proposing an interstate transmission pipeline must have two principle things: one, financing in astronomical sums, and, two, certificates of public convenience and necessity from the Commission. Investment bankers and underwriters of these securities require long-term supply and outlet commitments to justify the economic forecasts of the promoter. And the regulatory agency which, by the Certificates both approves the construction of the line and the issuance of securities for its financing, demands a like showing to establish fitness, ability and capacity to serve.[14]

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[14] Reference here to the Suspension Cases, and particularly Stanolind (No. 15627) and Continental Oil Co. (No. 15678), involving as they do gas from the Woodlawn Field, Texas removes this from the dreaded vacuum. The Federal Power Commission in the Mississippi River Fuel Corporation case (Docket G-1281, et al) in 1952 stated: "The most important matter presented for consideration in the instant Mississippi certificate proceedings concerns the adequacy of the gas supply showing made by Mississippi in support of its proposed system expansion. The importance

The imperative requirement that the purchaser have a long-term contract makes it essential that, in the ordinary course of business judgment, the seller have some means of protecting himself against the unpredictable fluctuations or developments in the twenty-year period. These take the form normally of automatic step increases in price at stated times or intervals and "Favored Nations" clauses, single or general, to assure that the seller has the opportunity of enjoying the general increase in the value of gas in the area, reflected by genuine, good faith transactions or tenders, and, invariably, for proportionate increases in production, severance, or similar state taxes.

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of an adequate gas supply showing has been stressed by the Commission in certificate proceedings, since every certificate of public convenience and necessity under the Natural Gas Act must be based upon appropriate findings, among others, that the applicant for such certificate is 'able and willing properly to do the acts and to perform the service proposed.' 'An adequate gas supply', as the Commission stated in its Opinion No. 230 and Order of June 24, 1952, *In the Matter of Northern Natural Gas Company*, Docket No. G-1618 • • •, 'is the bedrock upon which such findings must be grounded.' 'A gas supply can be considered adequate,' as the Commission further stated in the *Northern* case, *supra*, 'only if the volume available is sufficient to meet the demand requirements for the service proposed, if such volume is assured over a sufficient period of years to justify the expenditures required for the construction of the proposed pipe-line project, and if that assurance of a continuing supply of natural gas meets the requirements of public convenience and necessity. Generally, a supply of natural gas should be assured for a period approximating fifteen to twenty years, dependent upon the particular facts involved, if the pipe-line project is to be economically sound and in the public interest and if the natural-gas company is to be in position to meet its obligations to investors and provide dependable service to consumers.' " The Commission then recited that they had previously found Mississippi's supplies inadequate but allowed additional time to correct it. Acquisition of additional reserves is approved: "• • • At the 1952 hearings Mississippi showed that it had entered into additional gas purchase contracts, covering the purchase of gas in the • • • Woodlawn gas fields in Texas • • •. These contracts are for primary terms

The immediate effect of this Order is, therefore, to destroy the binding character of the agreement made between seller (producer) and purchaser (pipeline). The rate may ultimately be the same, but only after someone has convinced the Commission, or Court, or both that what the parties agreed to do was fair, just and reasonable.

The Commission seeks to avoid this impact by insisting that the contract "rate" preserved by *Mobile, supra,* is the one being charged at the particular time and that what is payable before or after is of no consequence. That may ultimately be the rule of law. But it is not the rule of business and to assert it by this Order subjects these parties to real and damaging and pressing results. It becomes all the more devastating when, as I shall later discuss, we consider the effect of the Order requiring that an Independent Producer file an application for a Certificate of Public Convenience and Necessity to institute a sale and secure approval before he may abandon it. For here, by virtue of the Order 174 regulations, a person who, at the time of the contract, was considered an individual enterpriser under no Governmental restraint or regulation, is suddenly informed that the contract rates to be paid to him in the last half of the contract period (and without which he would not have made the bargain) have no validity as a contract henceforth, and if collectible, they

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of 20 years and provide prices ranging between 10.88¢ and 12.46¢ per Mcf * * * at the beginning of their terms, and thereafter higher prices are specified. * * *"

Another Suspension Case, Union Oil (No. 15461), involves suspension of escalated rates under a long-term contract with Transcontinental Pipe Line Company resulting from a renegotiation of the contract long prior to June 7, 1954, made primarily to meet the objections of the Federal Power Commission in Dockets No. G-2367 and G-4185 (see opinions No. 279 and 280, December 1954, March 1955, respectively) to sufficiency of gas reserves. After restudy of the gas supply reserves showed them to be 16.6 to 17.9 years, Transcontinental's application for certificate to build and finance facilities costing approximately $40,000,000.00 to compete for the rich New York market area was approved.

are so only by order after a hearing by a Governmental bureau. Anyone outside of a courtroom would say that that was a real and present impact. I think Judges must recognize it as well.

And this business impact is not limited to pre-existing contracts. These petitioners are engaged in the search for and continuous production of gas. How can it be said that the presence of this regulation evincing a determined radical change in policy does not have a weighty and pressing effect upon current business judgments and transactions? If truck owners and television station owners are given the protection of judicial reviewability of orders of general application, regulations which alter markedly their business activity or immediately encumber, frustrate or handicap business plans, *Frozen Foods, supra, Storer, supra,* I would think these producers make out as appealing a case. As long as this regulation stands, new contracts cannot be made which give this margin of protection against unknown future changes over the long contract periods. Somehow the business man, as the gas producer, will have to adapt his activities to that situation. If he raises his rates to secure the aggregate of what was formerly on a sliding scale, he may lose the purchase-sales contract. If he reduces the price to a lower figure, he may soon find himself with a contract out of harmony with his neighbors. The point here is not whether this is good law or bad law; whether the regulation is valid or invalid —it simply is that as long as it stands undetermined all business is unavoidably affected by it.

Until this regulation is tested and the validity of this policy is determined, a major industry must speculate. This is a serious and troublesome point of law which a Court must and may determine. These Order 174 Cases and the Suspension Cases present it adequately for in both the Order does have an immediate, far-reaching consequence.

Nor can the impact of this pervasive policy against con-

tract escalations be avoided or lessened by self-help,[15] since the customer (purchaser) of one of these producers is invariably an interstate pipeline transmission company and, being licensed under Certificates issued by the Commission, it is forbidden in fact and practice to pay more for its gas requirements than approved contracts permit. The present customer (purchaser) under an existing contract cannot pay more even though it is in accordance with its agreement and it desires to do so, and the seller (producer) can find no relief by a termination of the contract since, as we shall see, Commission consent is demanded under the Order for termination or abandonment.[16]

This administrative prohibition of automatic contract escalation provisions also has important, far-reaching, immediate and pressing technical consequences in the administration of the Natural Gas Act. These consequences, while technical, have profound substantive results. This is so because Section 154.94, if valid, makes an automatic contract rate increase, a "change in the rate schedule."

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[15] It is doubtful that Government (Administrators) should ever be permitted, in insulating their actions from judicial review, to assert that the citizen must run the bold course of defiance as a means of testing legality. "Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. • • •" Columbia Broadcasting System, supra, 316 U.S. at 418, 86 L. Ed. at 1571.

[16] This is what the producers sought to do in the Abandonment Cases (Lee, Trustee, 15749; Shank, Trustee 15832), but which, for nearly two years, the Commission has thus far prohibited.

If it is a "new" rate by virtue of the regulation, it then falls under Section 4(d) of the Act requiring filing and notice before its effective date and, more so, it is then subject to Section 4(e) which gives the Commission the right to suspend for five months and require a repayment surety bond for subsequent collections until the rate hearing is completed. To these sanctions is added a burden of proof to show that the increased rate is just and reasonable.[17] On the other hand, if the automatic escalation increase is but a part of the entire total contract rate,[18] the application of the automatic increase is not the promulgation of a *new* rate, and the review[19] of such rate would be by a hearing pursuant to Section 5(a).

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[17] Section 4(e), "Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, * * * pending such hearing * * * may suspend the operation of * * * such rate * * *. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, * * *"

[18] United States v. Bethlehem Steel Corp., 315 U.S. 289, 298, 86 L. Ed. 855, 862: "The Master and the courts below, however treated these clauses as non-severable; to do otherwise would call for departure from accepted principles of the law of contract. Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all of the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.' Williston on Contracts, Rev. ed. § 863 and cases there cited."

[19] "The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract * * *. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a newly changed rate or

The Suspension Cases before us and the administrative experience[20] of the Commission demonstrate that this is no idle, academic, theoretical difference. It is the difference between suspension and no suspension, between money in the producer's hands and money in the purchaser's.

The Order thus introduces a revolutionary policy reversing a known business and administrative practice approved over the years. It is the regulation which does this and not the statute since, in the absence of the regulation, it would be open to producers and purchasers to place their own good faith construction upon Section 4(d) of the Act. But the regulation is imperative: a failure to file subjects the producer to a daily fine of $500.00. To collect the "new" rate, if the purchaser would pay it, would be another violation. Substantial doubts exist concerning the validity of the regulation. The doubt arises on its face. The danger and consequence, if invalid, is pressing and immediate. And no further record proof or

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contract * * * the further powers (1) to preserve the status quo * * * by suspending its operation * * * and (2) thereafter to make its order retroactive, by means of the refund procedure * * *." United Gas Co. v. Mobile Gas Corp., supra. [Italics by the Court]

[20] The Commission's letter report May 4, 1956, to Senator Gore revealed 191 cases involving annual increases (not including state tax increases) of $18,737,482.00 in which escalation rate increases have been suspended and hearing or decision is pending. Presumably, at least 5/12ths (5 months maximum suspension period) of this is an irretrievable loss to producers even though the Commission ultimately approves the increased rate. Apparently only 39 cases have been disposed of involving $3,218,297.00 annual increases, and the Examiner's reports and Commission decisions thereon submitted as typical examples of the Administrative problems indicate the complex matters which an applicant must face and perhaps shoulder in showing the proposed increase to be just and reasonable, e.g., is a fair price to be determined by the going price in the field? By invested capital, and if so, upon what basis, per well, or field, or unit? By a desired rate of return and if so, what percentage and upon what base?

evidentiary facts is needed to make it ripe for judicial determination.

The Order Requires Application for Certificate of Public Convenience and Necessity

The Order Forbids Abandonment-Termination of a Sales Contract Without Commission Approval

The purpose of the Commission to bring all producers within the scope of its interpretation of the Phillips case (defined in Section 154.91) and to subject all such producers to the severe obligations of a public utility is manifest by Section 157 of the Order. Certificates of Public Convenience and Necessity[21] must be obtained for each service and the service may not be abandoned[22] without Commission approval.

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[21] Section 157.23(a): "Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate • • • sale of natural gas subject to the jurisdiction of the Commission • • • shall • • • file with the Commission an application • • •. (b) No independent producer of natural gas shall, • • • engage in any new service with respect to the • • • interstate • • • sale of such natural gas for resale in interstate commerce • • • without approval of the Commission, evidenced by a certificate of public convenience and necessity • • •" The contents of the applications are carefully prescribed concerning exhibits, technical data required, etc.

[22] Order No. 174 A provided: Section 157.28 "No independent producer as defined in Section 154.91 of these rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained • • •."

In Order No. 174 B this was changed by substituting the words of Section 7(b) of the Act and adding the proviso: "*Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas."

The Abandonment Cases before us and other administrative

As in the case of other sections of the Order which I have discussed, the regulation has a force transcending the Act. In the absence of a regulation, it is left to the individual gas producer to determine whether he comes under the Act, is a natural gas company, whether the Act (Section 7(c)) is to cover sales, whether the sale is one bringing him within the Act or the Phillips decision and, on termination or abandonment, whether the sale is a service rendered by means of jurisdictional facilities. If he or his lawyer guess wrong, he is exposed to the possibility of enforcement proceedings (Section 20), or criminal prosecution (Section 21(a)) for "wilfully and knowingly" doing an act "declared to be unlawful", or as one who "omits or fails" to do an act "required to be done."

But with the regulation, all this is removed. It peremptorily requires the filing of an application for a Certificate, forbids the continuation of an existing, or the commencement of a new, service without it and forbids termination. Failure to comply subjects the person automatically to the penalties of $500.00 for each and every day during which noncompliance continues (Section 21 (b)). And all that would be open to determination would be the validity of the regulation.

It is just as obvious that these dual commands subject those in the gas business to substantial and immediate business consequences. As to existing contracts, the seller

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action taken indicates that in the administrative application by the Commission there is no difference between 174 B and 174 A for sales are considered "service rendered by • • • such facilities" and abandonment of a sales contract by an "Independent Producer" is forbidden: see J. M. Huber Corp. and Northern Natural Gas Co. v. J. M. Huber Corp., Dockets No. G-4326 and G-4957, Federal Power Commission v. J. M. Huber Corp., D.C.N.J., 133 F. Supp. 479 (now pending Court of Appeals, Third Circuit, No. 11799, argued June 18, 1956); Skelly Oil Co. and Lone Star Gas Co. v. Skelly Oil Co., Dockets No. G-5380 and G-5260; Argo Oil Corp., et al, Dockets No. G-6810, G-6811, G-2591 and G-2950.

(producer) is helpless in his effort to enforce the mutual obligations for automatic escalation rate increases. His purchaser may not pay him the agreed increase. He must file his application as an "initial" rate under Section 4 and suffer the risk of a suspension and the burden of establishing the reasonableness of the rates. His only relief of self-help—that is, termination—is denied him because he must obtain Commission consent here as well. Whether as to existing contracts or the making of new ones, a producer knows that this subjects him to the far-reaching responsibilities of a public utility—a status which courts are reluctant to impose because of the inevitable encroachment upon normal business freedom unless the statutory command is clear, *Munn* v. *People of the State of Illinois*, 94 U.S. 113, 24 L.Ed. 77; *Wolf Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 67 L.Ed. 1103. All persons dealing with a defined gas producer, whether banker, investor, processor, transporter, or purchaser, would of necessity have to trim negotiations and the final agreement to the pattern of public utility and its potential governmental regulation. Business men would know this instinctively. Judges, I think, should know as much.

And yet there is, at least, a substantial question whether the Act justifies a regulation imposing this *status* on the mere sale of gas, even one within the orbit of the Phillips case. There is a strong likelihood that the terms of the Act and legislative history will confine certification requirements to those constructing and operating physical facilities.[22]

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[22] The command to apply for a certificate is found in Section 7(c). Its opening sentence restricts it to the completion of proposed facilities: "No natural-gas company or person which *will be* a natural-gas company *upon completion* of any *proposed construction* or extension shall engage in the transportation or sale of natural gas * * *." (Italics mine) This was the amendment of February 7, 1942, Public Law No. 444, 77th Congress, Chapter 49, Second Session [H.R. 5249], 56 Stat. 83. In its original form the Act required a certificate only when a company was enter-

There is even greater doubt concerning the right to forbid or regulate abandonment of sales since the Act[24] relates expressly to service by jurisdictional facilities. The Congressional purpose[25] to restrict the prohibition against abandonment to services rendered by jurisdictional facilities seems quite plain and is, interestingly enough, apparently acknowledged by the Commission.[26] If, then, the

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ing a "market in which natural gas is already being served by another natural-gas company * * *" As investors and promoters were unwilling to risk the building of a line unless the statutory condition were met, it resulted in invariable hearings to prove the negative. The amendment was sought by the Commission to require certificates in the case of all *construction*, see hearings on H.R. 5249, 77th Congress, page 15 et seq.

[24] Section 7(b), "No natural-gas company shall abandon all or any portion of its *facilities* subject to the jurisdiction of the Commission, or any service rendered by means of such facilities * * *." [Italics mine]

[25] The Act originated in H.R. 5423, 74th Congress, as amendments to the Public Utility Act of 1935 with a "facilities" provision identical with Section 7(b) (see hearings H.R. 5423, 74th Congress, 1st Session, pages 32, 44, § 305(b)); the next bill, H.R. 11662, 74th Congress, 2nd Session, contained no prohibition on abandonment and representatives of the State Commissioners proposed an amendment that, "No gas company * * * shall discontinue service * * *," but this was rejected and language of present § 7(b) was used. In the 75th Congress, 1st Session, on H.R. 4008, efforts by the New York Public Service Commission to obtain an amendment, "No natural gas company shall abandon service to any of its customers * * *" failed, and H.R. 6586, 75th Congress, 1st Session, which became the Act, contained the language now found in § 7(b). The Committee report, No. 709, 75th Congress, 1st Session, stated, "Subsection (b) requires approval of the Commission by any natural gas company desirous of abandoning any or all of its facilities subject to the jurisdiction of the Commission * * *."

[26] By letter, June 17, 1955, from Chairman Kuykendall, Federal Power Commission, to Chairman of the Senate Committee on Interstate and Foreign Commerce, amendment of Section 7(b) was proposed to make clear " * * * that the Commission is authorized

proper construction of 7(b) is that it relates only to services rendered by jurisdictional facilities, the regulation would be invalid in prohibiting termination of sales contracts unless the given sale was accomplished through physical facilities owned or operated by that producer in the performance and rendition of the sale and such facilities were "subject to the jurisdiction of the Commission."

And finally, the petitioners urge with much basis, the *sale* of gas by a producer from a producing well is a direct and immediate part of production and is therefore within the full protection of Section 1(b). Nothing in the Phillips decision detracts from prior holdings that the Commission is powerless to regulate, forbid, prohibit, or direct the production of gas, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 93 L.Ed. 1499.[27]

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to pass upon the proposed abandonment of any sales in interstate commerce for resale by independent producers." See hearings, 84th Congress, 1st Session, on S.712 et al, pages 1234, 1235. No such bill was passed. Apparently the Commission has sought from Congress legislation designed to impose a general service obligation, see hearings, 80th Congress, H.R. 4051, pages 99, 100, 428-430, 461-462, and has sought to amend Section 7(b), see Annual Reports 1951 at page 145; 1952 page 152; 1953 page 155; 1954 page 170.

[27] The Commission's Order forbidding the transfer of leases was reversed: "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act * * * In Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 603, 89 L. Ed. 1206 * * * we said that this phrase comprehended the producing properties and gathering facilities of a natural gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of Congressional intent. Of course, leases are an essential part of production. * * * The Federal Power Commission leans heavily upon Section 7(b) * * *. The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently

If, without let or hindrance from the Commission, a certificated natural gas company can surrender or transfer its leases—that is, the right to the gas—because the leases and the gas covered thereby are a part of production, it seems difficult to believe that a producer cannot determine whether he will continue to permit gas which he is producing to leave his well, and if so, whether it shall go to one or to the other.

The present Order forbids this. It is ever-present in the shaping of gas transactions. And in the Abandonment Cases before us, it has kept particular gas producers from enjoying the fruits of and complying with the contracts made by the new purchasers with consequent substantial money losses.

The Order Compels Other Action

By operation of the Order, the magic date of June 7, 1954, is of critical importance. If it is valid, it orders a roll-back of rates to a prior date. Imposing a retroactive rate which is beyond the general power of the Commission subjects producers to real and immediate harm. If it is not valid, it requires no record, no evidence to determine it. These and many other specific impacts result from the Order, but those discussed sufficiently illustrate the practical consequences and the ripeness now for judicial review. Serious questions of law call for an immediate determination by constitutional courts. Neither orderly administration nor due regard to the separation of executive

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abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission.' " Federal Power Commission v. Panhandle Eastern Pipe Line Company, supra, at 337 U.S. 504-509, 93 L. Ed. 1504-1507. And see Colorado Interstate Gas Co. v. Federal Power Commission, supra, Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 91 L. Ed. 1742; Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 88 L. Ed. 333, approved expressly in the Phillips decision.

and judicial functions compels or suggests that review should be postponed.

II.

Suspension Cases

In each of the Suspension Cases, the producer sought to collect the increased rate resulting from automatic contract escalation provisions. These rate increases were treated as "new" filings under Section 4 and were suspended for various periods of time. As thus presented each involves the question discussed at length concerning the nature of escalation increases and the Commission's power to forbid them. That is a serious question of law with substantial arguments on both sides. If what I have said is correct, then these petitioners in the Suspension Cases are certainly aggrieved and, as to them, the question is ripe for judicial review.

But the majority never gets to this point for the holding is simply that a suspension order, even though invalid, is not a Section 19(b) "Order." In my judgment, this ignores the significant absence of any modifying term such as "final" in Section 19(b) and is, again, a situation in which the Court has closed its eyes to reality. A suspension order is final in fact. As these verified petitions reflect, for the period of suspension the seller has been unable to collect what he claims is the rightful increase in rate. This amounts in dollars to huge sums of money individually and collectively. There is no relief because the Commission has no power to award reparations or to impose out of current rates an amount needed to make up for a past deficiency due to an improvident suspension.[28]

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[28] Federal Power Commission v. Hope Natural Gas Company, supra; State Corporation Commission of Kansas v. Federal Power Commission, 8th Cir., 215 F. 2d 176; Hope Natural Gas Company v. Federal Power Commission, 4th Cir., 134 F. 2d 287, 310, "The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission * * * regulatory power as to future

Testing reviewability the hypothesis must be that the Order is invalid. On that assumption what more is needed, either to impose real, pressing, irreparable injury, or to present for review the serious question of law? Each of these Suspension Cases presents the common question: Is an escalation increase subject to suspension? If it is, then the matter must grind through the administrative process. If it is not, then no facts, no evidence, no peculiar circumstances can make it such. And the Commission's suspension order, in such an eventuality, ought to be set aside to restore the parties to their prior condition so near as the law may do it. Of course, the Commission cannot, to defeat reviewability, assert that "facts" are needed to prove that petitioners are subject to the Act, for the very act of issuance of the suspension order is a finding of coverage. Petitioners may question it on the review when granted, but the Administrator can not claim he lacked power to do what was done.

Moreover, it should be remembered that a suspension is a unique procedure from the standpoint of both the gas company and the Commission. The Commission's power is extremely limited. It may invoke it only within the 30-day notice time and it may not extend it beyond five months. Once the rate becomes effective, it is assumed that no power to suspend can be revived. Once the five months has expired, the power is gone except insofar as the surety bond may continue it conditionally in effect. It is entirely separate from the hearings which must be held, *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation, supra,* and whatever is done within the five months is forever and irretrievably final. When one seeks a judicial review of an order assumed to be invalid because

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rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission • • • As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates."

it forever deprives a person of his right to recover substantial sums of money presumably due under a contract, and the question of its validity will have no bearing whatsoever on the ultimate approval of the rates involved, the appeal is not an effort, as characterized by my Brothers, to disturb the orderly administrative processes.

Precisely this problem—an illegal suspension order—was presented in *Atlantic Seaboard Corporation* v. *Federal Power Commission*,[29] 4th Cir., 201 F. 2d 568, and jurisdiction under Section 19(b) was sustained. I have searched in vain for those facts or legal principles which have led my Brothers to state, "We think that case is clearly distinguishable from the case at bar." And to it may now be added *Phillips Petroleum Company* v. *Federal Power Commission*,[30] 10th Cir., 227 F. 2d 470. See also *Isbrandtsen*

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[29] To the familiar lament from the Commission, the Court stated at 201 F. 2d 572: "We are not impressed with the argument that we are without jurisdiction in the premises * * *. The Commission argues that the order which we are asked to review is not a definitive or final order * * *; but our power to review is not limited to final orders. * * * The order which we are asked to review is therefore sufficiently distinct from the general subject of the litigation and sufficiently final and definite to justify us in exercising the power of review vested in us by the statute."

[30] The same objection was made: "Reviewability is thus not strictly limited to final orders. * * * And, reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review. See Atlantic Seaboard Corp. v. Federal Power Commission, 4th Cir., 201 F. 2d 568; * * *. The Orders sought to be reviewed here do not deal with the merits of the proceeding before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. That matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to charge Michigan on June 7, 1954 * * * the legal consequences which attach to these orders have conclusive effect on the rights and duties of Phillips as an independent producer * * * and they are therefore reviewable." 227 F. 2d at 474.

Co., Inc. v. *United States,* D.C. Cir., 211 F. 2d 51, cert. den. 347 U.S. 990, 98 L. Ed. 1124; *Algonquin Gas Transmission Co.* v. *Federal Power Commission,* 1st Cir., 201 F. 2d 334. If the order is the only one which can ever be entered and no collateral proceeding depends upon it, it is sufficiently final, when realistically appraised, to permit reviewability where, on the hypothesis or substantial showing of doubtful validity, great and pressing harm will flow.[31]

Nor, in my view, does reviewability of the Suspension Cases depend finally on invalidity of the regulation forbidding automatic escalation. The parties raised other and substantial questions concerning the sufficiency of the administrative process. These include the repeated use of stereotyped suspension orders magnified in several instances by other stereotyped denials of rehearing and whether such rubber-stamped treatment met the demands of the statute that the Commission, in suspending, shall deliver "to the natural gas company affected thereby a statement in writing of its reasons for such suspension", Section 4(e); *Amarillo-Borger Express* v. *United States, supra,* and *Long Island Railroad Company* v. *United States, supra.* And, as to at least two of them (Stanolind 15627 and Continental 15678), the action bordered upon complete administrative irresponsibility since for the very same contracts covering the very same gas out of the very same well, the Commission found, in the stereotyped rubric, that the identical rate should be suspended as to one seller but

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[31] See Amarillo-Borger Express v. United States, N.D. Tex., 138 F. Supp. 411, expressly approved and followed in Long Island Railroad Company v. United States, E.D.N.Y. [Civil Action 16321, May 9, 1956] . . . F. Supp. . . ., (statutory three-judge courts), in which an illegal revocation of a suspension order by the Interstate Commerce Commission was enjoined. The extensive materials dealt with under the Administrative Procedure Act raises considerable doubt in my mind that the Court's action here, in rejecting the Administrative Procedure Act, is correct. Of course, reviewability depends on the statutes and not what the parties say they invoke. See footnotes 2, 3 and 4, United States v. Storer Broadcasting Co., supra.

not as to a co-seller. In this and the other respects the State Tax Escalation Cases likewise fit in this category.

III.

Abandonment Cases

In each of these cases, the producer (seller) had a right under the contemporary contracts to terminate the sale of gas. In one there was the right to obtain an increase in the price if bona fide offers were available from others. The current customer declined to meet the tendered increase, and the producer sought to exercise the contract right of termination and sell gas in the future to the new purchaser at the increased price. In the other, the producer sought to exercise his contract right to select his own purchaser and conclude a gas sales agreement with that new purchaser. By whatever label described, the letters and orders of the Commission have effectually prevented the producer from exercising the right to terminate, that is, abandon the sales contract. This is done pursuant to the indicated sections of Order No. 174. If, as the analysis indicates, there is substantial doubt that Section 7(b) covers sales when no jurisdictional *facilities* exist, that order is an illegal one depriving the petitioners of immediate, substantial benefits. If that order is illegal, it is so because of the limited nature of Section 7(b), and no facts, no evidence, no record is needed or essential to an orderly presentment of that substantial and serious question.[82]

By virtue of Section 154.97 (cancellation of rate schedules) and Section 157.23(b), it was likewise necessary for these petitioners to file notice of termination of rate schedules and a request for the issuance of a new Certificate of Public Convenience and Necessity for sale of the

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[82] On the review, if granted, there would be a substantial question whether the Commission had the right to "reject", as they did, one or more of these filings. Mississippi River Fuel Corp. v. Federal Power Commission, 3 Cir., 202 F. 2d 899.

gas to the new purchaser. If, on the analysis I have set out, these regulations are beyond the power of the Commission, it means that by their operation, the petitioners have been deprived of the immediate enjoyment of their private contract rights. That issue is present and has immediate consequences.

IV.

State Tax Escalation Cases

These cases raise the question of the collectibility of increases in the Texas State Production Tax as provided under automatic rate increase escalation provisions in the contracts. Thus they present, in dramatic fashion, the question so vigorously argued by all petitioners on the propriety of the regulation forbidding escalation clauses. The Court in arriving at a decision, presumably on the merits, completely bypasses this question. If, as my discussion indicates, that order may be invalid, then the Commission had no right in these cases to forbid Continental Oil Company from collecting the increase from its effective date (September 1, 1954). (I do not decide this question since I think it too important to determine until we, as a Court, reach it for deliberative joint judgment.) Moreover, the Court's opinion in emphasizing the fact that there was no proof in the record of discrimination in favor of other companies under like situations overlooks the fact that the petition for rehearing, declined by the Commission, raised those facts and that charge. When it was overruled, I am at a loss to understand how the petitioner could have made any proof. Finally, while the transmutations of the order and the change of dates from September 15 to October 1 and December 1 as set forth in the opinion is accurate, it seems to me that the whole Act imposes on the Commission the necessity of having some reasonable basis for its actions. Conceding, for the moment that there was intended significance in what appears to me to be inadvertent scrivener errors

made under circumstances of understandable and almost hysterical pressure, I would have considerable doubt that a Commission may say to one Texas producer that if the application is filed on October 1, the increase can relate to September 1, but if it is filed on October 2 or November 29, it may not. Not a single reason has yet been advanced to justify that differentiation, and it is evident from the fact that the 174 Orders finally extended filing dates to December 1, that the Commission did not articulately do this because of some administrative necessity. Finally, since the Court does reach some of the merits here, I can find in the record no basis for assuming that the sales involved in these contracts were within the jurisdiction of the Commission. Such findings and evidence is necessary. *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87 L. Ed. 626; *Stark* v. *Wickard*, 321 U.S. 288, 80 L. Ed. 733; see also, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 512, 92 L. Ed. 128, 135.

I have written at such length as my views in all cases because I think these many troublesome legal questions are begging for a Judge's answer. What the answers will be, I do not know. But the Commission by its 174 Orders and action in the individual cases has presented cases ready and ripe for adjudication.

We shut ourselves off from life if we think that that which has had the gas business in such turbulence has, as yet, no affect or impact.

I therefore respectfully dissent.

A True Copy:
Teste:

JOHN A. FEEHAN, JR., Clerk

By /s/ CLARA R. JAMES
Deputy
Clerk of the United States
(SEAL) Court of Appeals for the Fifth Circuit

Judgments

EXTRACT FROM THE MINUTES OF JUNE 30TH, 1956

No. 15799

HUNT OIL COMPANY,

versus

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Hunt Oil Company for a review of an order of the Federal Power Commission entered on June 23, 1955, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, dismissed for lack of jurisdiction.

"Brown, Circuit Judge, dissenting."

EXTRACT FROM THE MINUTES OF JUNE 30TH, 1956.

No. 15928

HUNT OIL COMPANY,

versus

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Hunt Oil Company for a review of an order of the Federal Power Commission entered on October 28, 1955, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, dismissed for lack of jurisdiction.

"Brown, Circuit Judge, dissenting."

APPENDIX B

Excerpts From the Natural Gas Act

RATES AND CHARGES; SCHEDULES; SUSPENSIONS OF NEW RATES

SEC. 4. * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be

increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. * * * [52 Stat. 823 (1938); 15 U.S.C. 717d (1946)]

REHEARING; COURT REVIEW OF ORDERS

SEC. 19. * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken,

and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Excerpts From Title 18, Code of Federal Regulations.

(A) PART 154—RATE SCHEDULES AND TARIFFS—OF SUBCHAPTER E, REGULATIONS UNDER THE NATURAL GAS ACT, CHAPTER I OF TITLE 18, CODE OF FEDERAL REGULATIONS.

§ 154.91 *Applicability.*—(a) An "independent producer" as that term is used in this Part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

(b) The filings with regard to all sales required under § 154.92, § 154.94 and § 157.23 may be made by (1) an operator of one or more wells under co-ownership, (2) an operator where a group of producers are unitized for production and sale, or (3) an operator of a plant processing natural gas and located in the producing area of the gas which it processes and the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator. Where filings are made by an operator under this paragraph, the parties to the operating arrangement, and those producers who sell to

the processing plant described in clause (3) herein, need not file hereunder. When a filing is made by an operator under clauses (1) or (2) herein, he shall submit therewith (i) a list of all persons having working interests involved in the sale of natural gas covered by his filing, (ii) a list of the parties to the operating arrangement, and (iii) a statement of their percentage of their interests. When a filing is made under clause (3) herein, the operator shall file a list of the producers from whom the natural gas is purchased, showing the percentage received by each from the sales. The operator filing hereunder shall submit every twelve months thereafter a statement showing any changes in the several respects since the list was previously submitted.

§ 154.92 *Filing of Rate Schedules by Independent Producer.*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

• • • • •

§ 154.94 *Changes in Rate Schedules.*—(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in duplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

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410648—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 584

HUNT OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The orders of the Federal Power Commission (R. 68–70, 173–174) are not reported. The opinion of the Court of Appeals (Pet. App. 1a–42a) is reported at 236 F. 2d 828.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (Pet. App. 43a). A petition for rehearing, timely filed, was denied on August 21, 1956.

[1] The opinion of the court below in *Humble Oil and Refining Co.* v. *Federal Power Commission*, relied on by the court in this case, is reported at 236 F. 2d 819. Judge Brown's dissenting opinion in both this case and *Humble* is reported at 236 F. 2d 793.

The petition for a writ of certiorari was filed on November 17, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTION PRESENTED

Whether an order of the Federal Power Commission, setting a hearing on a rate increase proposed by an independent producer of natural gas and suspending the rate increase pending the hearing in accordance with Section 4 (e) of the Natural Gas Act, is reviewable under Section 19 (b) of the Act where the Commission has neither held the hearing nor finally passed on the propriety of the proposed increase.

STATUTE AND REGULATIONS INVOLVED

The applicable portions of the Natural Gas Act and the Federal Power Commission regulations are set forth in Petitioner's Appendix at pp. 44a-50a.

STATEMENT

In this case, the Federal Power Commission, acting pursuant to Section 4 (e) of the Natural Gas Act, ordered hearings to determine the legality of two proposed rate increases filed by petitioner, an independent producer of natural gas, and pending such hearings suspended the increased rates. Without awaiting the Commission's final determination as to the proposed increases, petitioner sought review of the suspension orders in the court below. Incorporating by reference its opinion in *Humble Oil and Re-*

fining Co. v. *Federal Power Commission,* pending on petition for a writ of certiorari, No. 530, this Term, the Court of Appeals held that the suspension orders were interlocutory, and unreviewable under Section 19 (b) of the Natural Gas Act prior to the issuance by the Commission of final orders made after a hearing on the proposed increases (Pet. App. 1a–5a). The pertinent facts may be summarized as follows:

In July 1952 petitioner, an independent producer of natural gas, contracted to sell United Gas Pipe Line Company natural gas produced by it for a period of twenty years (Pet. App. 1a–2a). On June 7, 1954, this Court entered its decision in *Phillips Petroleum Company* v. *Wisconsin,* 347 U. S. 672, holding that sales by independent producers of natural gas for resale in interstate commerce are subject to the provisions of the Natural Gas Act. In August 1954 the Commission issued Order No. 174–A (19 F. R. 5081) which provided a simplified procedure whereby independent producers subject to the Act were to file schedules of their June 7, 1954, rates as their initial rate schedules under the Act. Pursuant to this order, petitioner, under protest, filed its United contract as an initial schedule in October 1954.

In accord with long standing Commission practice, Order No. 174–A also provided that periodic changes in rates made pursuant to escalation clauses in existing contracts constituted changes in the rate schedule and should be filed as rate changes under Section 4 (d) of the Act (Pet. App. 49a–50a). Since its

United contract provided that the rate was to increase from 13.5 to 14.5 cents per Mcf on June 1, 1955, petitioner filed this rate increase, also under protest, on May 31, 1955 (Pet. App. 2a). The Commission, on June 23, 1955, ordered a hearing into the legality of the increased rate and, pending the hearing, suspended the filing (and thereby the effectiveness of the increase) for the five month period provided in Section 4 (e) of the Act (Pet. App. 2a).

Petitioner's United contract also provided for a second increase in its rates, from 14.5 cents per Mcf to 21.20 cents per Mcf, to be effective November 1, 1955. On September 22, 1955, petitioner filed this rate increase with the Commission under protest (Pet. App. 3a). The Commission ordered a hearing on this increase and, pending the hearing, suspended the increased rate on October 28, 1955 (Pet. App. 3a).

Petitioner filed timely applications for rehearing on both Commission orders, and on denial of these applications, petitioned for review by the Court of Appeals (Pet. App. 2a–4a). The suspension orders terminated on December 1, 1955, and April 1, 1956, respectively, when the increased rates went into effect pursuant to bonds submitted by the petitioner, as provided in Section 4 (e) of the Act.

ARGUMENT

1. Like the petition in *Union Oil Company of California, et al.* v. *Federal Power Commission,* No. 579, this Term, the present petition raises the identical issue involved in *Humble Oil and Refining Co.* v. *Federal Power Commission,* pending on petition for writ

of certiorari, No. 530, this Term:—whether orders of the Federal Power Commission setting hearings and, pending such hearings, suspending rate increases for sales of natural gas by independent producers are invalid on the ground that the increases were provided for in a contract filed as an initial rate schedule and hence should be treated as part of the initial rate schedule and not suspendible under Section 4 (e) of the Natural Gas Act.[2] Since petitioner's contentions are basically the same as those in *Humble,* and since the court below dismissed the petition for review on the basis of its reasoning in that case, the discussion in the Commission's brief in opposition in *Humble* is fully applicable here and we respectfully refer the Court to that brief. See also the Commission's brief in opposition in *Union Oil Company of California, et al.* v. *Federal Power Commission,* No. 579, this Term.

2. Petitioner errs in its claim that the decision below conflicts with Court of Appeals rulings in addition to those alleged in the *Humble* and *Union Oil Company* petitions.

Isbrandtsen Co. v. *United States,* 211 F. 2d 51 (C. A. D. C.), certiorari denied, 347 U. S. 990, the first of the cases relied on by petitioner (Pet. 6, 7), did not involve an interlocutory suspension order.

[2] Petitioner has abandoned in this Court the other grounds of alleged invalidity of the suspension orders which it urged upon the court below and which that court rejected, including its assertion that the orders were invalid as applied to an increase in rates for sale of gas for industrial use only (Pet. 3; Pet. App. 4a).

The Court of Appeals for the District of Columbia Circuit struck down as unlawful a proposed provision in a shipping conference agreement which would have "virtually removed Isbrandtsen [an independent steamship company] from the shipping market involved" (*Id.* at 56), because it had not been approved by the Federal Maritime Board as required by Section 15 of the Shipping Act of 1916 (46 U. S. C. 814). The Board's order had purported to allow the provision, which discriminated against non-conference shippers, to go into effect pending a hearing as to its legality. The court concluded, properly, we believe,[a] that that part of the Board's order which could be interpreted as authorizing the discriminatory rate was final, and hence reviewable under 5 U. S. C. 1032 (c).

Far from conflicting with the decision below, *Isbrandtsen* highlights the interlocutory character of the orders here involved. The order in that case was not a preliminary or procedural step in a rate proceeding; it had no logical relation to the Board's consideration of the legality of the new rate, which, as the court held, could be made effective only after the Board's hearing and approval (211 F. 2d at 56–57). Moreover, like the order in *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, and unlike the present orders (see our *Humble* brief in opposition, pp. 5–7), the Board's order had an immediate

[a] The United States, the formal respondent in a proceeding to review an order of the Federal Maritime Board, supported Isbrandtsen's contentions as to the reviewability and illegality of the order (211 F. 2d at 55).

and definitive adverse effect on the complainant's contractual relations with its shippers.[4]

Algonquin Gas Transmission Co. v. *Federal Power Commission,* 201 F. 2d 334 (C. A. 1) (Pet. 6, 9) involved, *inter alia,* the reviewability of a Commission order dismissing an application by a pipeline company for a temporary certificate of public convenience and necessity to initiate a service, pending decision on its application for a permanent certificate which was subject to the conflicting application of another pipeline. The First Circuit, after noting that the order had no necessary relationship to any subsequent order by the Commission granting or denying a permanent certificate for the same service, found (201 F. 2d at 338):

> Although Algonquin's application for a temporary certificate was in form titled as a part of the underlying proceeding, it really should be regarded as carved out of the main proceeding and as partaking of the nature of a separate proceeding, in which the Commission was asked to exercise an asserted distinct substantive power under Sec. 7 (c) to meet an emergency situation, pending determination of what might be a protracted main proceeding. The Commission's order of October 31, 1952, finally disposed of that separate, substantive application; and hence we think the order was not "merely preliminary or procedural" in char-

[4] One judge dissented on the ground that the appropriate remedy for relief from an illegal order of the Board was by way of an injunction suit in the District Court (211 F. 2d at 57–58).

acter, but had the necessary degree of finality to be immediately reviewable under Sec. 19 (b).[5]

Finally, *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 202 F. 2d 899 (C. A. 3) (Pet. 7), concerned the Commission's rejection of a rate filing by a natural gas company on the ground that it violated Commission rules. The court did not pass upon its jurisdiction to review the order, which was not challenged. The order was final in any case, since it did not contemplate further action on the part of the Commission. Moreover, since amendment and resubmission of the Company's application would have initiated an entirely different proceeding before the Commission, in which the original order would not have been reviewable, that order was reviewable in the proceeding in which it was issued, if it was to be reviewed at all. Here, the order is a preliminary step in a single, continuous proceeding directed at determining the validity of petitioner's rate increase, and the issues which petitioner seeks to raise at this point are open to review at the termination of the entire proceeding.

These three decisions, cited by petitioner, are alike in involving final orders bearing no relation, procedural or substantive, to further proceedings before the Commission but having a substantive and immediate impact on the companies subject to them. Such holdings have no bearing on the issue of the reviewability of an order setting a hearing and suspending

[5] The Commission agreed that its order in *Algonquin* was final, and urged the court to review it (see 201 F. 2d at 337).

rate increases as a necessary preliminary to a Commission determination as to the legality of the increased rate, as part of a statutory procedure specifically provided by Congress. See the Commission's brief in opposition in *Humble,* No. 530, at pp. 7–12.

3. Lastly, petitioner claims (Pet. 10) that the Commission's orders "conflict" with the Natural Gas Act as interpreted in this Court's recent opinion in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U. S. 332. *Mobile* involved the question whether a gas company by making use of the filing provisions of Section 4 (d) of the Act could impose on its customer an *ex parte* rate increase in violation of an existing contract. The present case is very different. Here, the parties have by prior contract agreed to the rate change and what petitioner is seeking to do is to put its rate increases in effect as initial rate schedules and thereby avoid the suspension provisions of Section 4 (e)—an issue on which this Court recently denied certiorari, and which was neither considered nor decided by the Court in *Mobile.* See the Commission's briefs in opposition in *Cities Service Gas Producing Co.* v. *Federal Power Commission,* certiorari denied November 13, 1956, No. 418, this Term, and in *Continental Oil Co.* v. *Federal Power Commission,* No. 457, this Term.

CONCLUSION

For the reasons here stated, as well as for the reasons set forth in the other Commission briefs in opposition to which we have referred, it is respectfully

submitted that the petition for a writ of certiorari should be denied.*

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* See footnote 7, page 11 of the Commission's brief in opposition in *Union Oil Company, et al.* v. *Federal Power Commission*, No. 579, this Term.

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